

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT
2.59.1701 through 2.59.1705 and)	AND ADOPTION
2.59.1710 pertaining to the licensing and)	
regulation of mortgage brokers and loan)	
originators and the adoption of NEW)	
RULES I through VIII regarding)	
continuing education, prelicensing)	
examination, designated managers,)	
examinations, failure to correct)	
deficiencies, grounds for the denial of an)	
application, costs in bringing the)	
administrative action, and scheme to)	
defraud or mislead)	

TO: All Concerned Persons

1. On April 24, 2008, the Department of Administration published MAR Notice No. 2-59-396 regarding the proposed amendment and adoption of the above-stated rules at page 666 of the 2008 Montana Administrative Register, Issue No. 8.

2. On May 21, 2008, a public hearing was held in Helena concerning the proposed amendment and adoption. Four people testified. Five people submitted written comments. One person who commented at the hearing also submitted additional written comments.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments and testimony received and the department's responses are as follows:

Comment #1: Cyndy Rigler, president of Western Home Mortgage Corporation and of the Montana Association of Mortgage Brokers (MAMB), opposed the fee increase in ARM 2.59.1704. She submitted an additional comment comparing licensing fees that other professions in Montana pay to the licensing fees that mortgage brokers pay. Brian Gorman of Alpha Mortgage Investments, Inc. also commented that the fee increase is a substantial increase with no justification as to why, but it appears to be an attempt to grow the revenues of the department so as to justify its growth and existence. Charles Bott, secretary of the Montana Association of Mortgage Brokers and president of CrossBow Mortgage, Inc., submitted comments identical to those of Cyndy Rigler. Steve Stiles, Big Sky Mortgage Services, commented that the licensing fees are unnecessary and put an undue burden on brokers. He stated that the cost will ultimately be passed on to consumers. He commented that the state should go to a two-year license instead of a one-year license.

Response #1: The department proposed the fee increase because the cost of regulating mortgage brokers and loan originators exceeds the revenue from this licensing program. Section 32-9-117, MCA, states, "The fees set by the department must be commensurate with the costs of the program." In order to cover the costs of the program administration, the department must raise the renewal licensing fees. In fiscal year 2008, the department operated this licensing program at a loss of \$180,218. The department has not increased renewal fees since the inception of the program in 2004. By virtue of this new fee increase for license renewals, the department estimates that it would gain an additional \$76,250 in revenue. This estimate is based upon the current number of licensees. Even with the fee increase, the department may have to absorb an additional revenue loss in FY 2009. However, the department is taking a reasonable action to raise the renewal fees to match the fees that are paid for the initial licenses. The department is not aware of the operational costs to administer other licensing professions in Montana. The department is bound by statute to set fees to be commensurate with the cost of this program. Therefore, the department cannot draw a comparison to fees charged for other licensing professions in Montana. The one-year license format is set by statute and cannot be changed by administrative rule.

Comment #2: Cyndy Rigler commented that the fee increase rule was not provided to MAMB in the proposed notice of amendment and adoption issued in September 2007 or in the draft of the rules provided to MAMB in January. MAMB would like the opportunity to review this matter with the department prior to the fee increase being adopted.

Response #2: The department provided a representative of the MAMB Board with an e-mail notifying him of the department's intent to raise fees on March 11, 2008. In addition, the department provided MAMB with a notice of the proposed rulemaking and opportunity to comment on the proposed rules at the hearing as well as by written comment. The MAMB has taken advantage of both those opportunities to comment on the proposed amendments to the rules. The proposed rulemaking notice, which was published on September 20, 2007, was separate from the proposed rulemaking notice published on April 24, 2008. The department did not propose a fee increase in the notice that was published on September 20, 2007. In fiscal year 2008, the division operated the mortgage broker and loan originator program at a loss of \$180,218. This revenue loss for this program loss was not yet apparent to the department in September of 2007 or at the time when the department provided MAMB with another rule draft in January of 2008.

Comment #3: Dave Christensen, Mountain Lake Mortgage Corporation, commented that the timing and amount of the proposed license renewal fee increases will put considerable burden on small mortgage brokers who are already struggling to survive in the current environment. He states that the increase in the entity fee from \$50 to \$500, unless you are the sole owner of a corporation, means that a small, family-owned or closely held corporation is charged the full fee. He encourages the department to allow small, family-owned or closely held corporations to be treated the same as solely owned entities.

Response #3: Section 32-9-117(1)(b), MCA, requires that an individual seeking licensure as a mortgage broker and who is the sole owner of an entity seeking licensure as a mortgage broker be charged a single application fee. From the regulatory perspective, an entity that is licensed separately from an individual is a separate applicant and must be investigated and licensed separately. When an entity applies for licensure, it must provide the documentation showing its separate existence as an entity as well as the names and addresses of the owners or managers of the entity. There is as much or more regulatory review and investigation that goes into the licensure of an entity as goes into licensure of an individual. Therefore, the entity should pay the same amount as the individual being licensed. However, in the case of a solely owned entity, the individual and the sole owner of the entity are one and the same, resulting in one investigation and requiring less regulatory time than an entity that is made of other individuals.

Comment #4: Cyndy Rigler, Charles Bott, and Kristi Blazer, lobbyist for the MAMB, opposed the testing at the end of continuing education courses, which must be passed with a 75% score as proposed in the amendments to ARM 2.59.1705. Ms. Blazer commented that other professions in Montana are not required to pass a test after continuing education courses; however, other states are adopting testing requirements for the mortgage broker industry.

Response #4: The department agrees and will remove the testing requirement after continuing education courses.

Comment #5: Cyndy Rigler and Charles Bott commented that New Rule VIII(1)(c) appears to prohibit the acceptance of any fees to be remitted to a third party.

Response #5: The subsection will be redrafted to read, "charging or accepting any fees in excess of fees that have been or will be remitted to third parties."

Comment #6: Brian Gorman commented that he found the language "sole owner of an entity" within ARM 2.59.1704 confusing and unfair to closely held, family corporations.

Response #6: The language "sole owner of an entity" comes from 32-9-117(1)(b), MCA. That section states: "An individual who is seeking licensure as a mortgage broker and who is the sole owner of an entity that is seeking licensure as a mortgage broker shall pay a single initial nonrefundable license application fee of \$500." The department, in proposing the rules, has complied with 32-9-117(2), MCA. The statute requires the department to charge a single fee to an individual who is seeking to renew an individual license and who is also sole owner of an entity that is seeking to renew its entity license. The department drafted the proposed rule to be consistent with the statutes. In the case of a closely held corporation, if the corporation is not solely owned by the individual seeking licensure or renewing its license as a mortgage broker, the entity is subject to a separate licensing or relicensing fee. This is because the entity must apply separately and the entity

application or renewal must be reviewed and investigated separately from the individual application or renewal.

Comment #7: Brian Gorman commented on ARM 2.59.1705(16) that, while it is of marginal concern to him personally, if he were an education provider, he would skip over Montana if the department was going to charge fees for both reviewing the class and for each hour and not refund any of the above fees if approval is denied.

Response #7: The department charges education providers the application fee of \$100 that is required every two years. If a licensed education provider wants to offer a class, it must submit the class materials for review and approval by the department. There is a \$50 fee per credit hour requested. The department does not refund the fees if approval is denied for a particular class because the department staff must commit their time to reviewing the materials whether the class is approved or denied. The department would lose money if its employees spent time reviewing a course that was not adequate and then refunded the fees to the provider of the unapproved course.

Comment #8: Brian Gorman commented that in the statement of reasonable necessity for the amendment to ARM 2.59.1705(2) this statement appears: "The department is concerned, based on the examinations that it conducts, that mortgage brokers and loan originators do not comprehend the training that they are receiving." Mr. Gorman commented that the department has no evidence to support this statement, which is insulting on its surface and would be an indication that the courses the department approved are not adequate. He said mortgage brokers could comprehend laws and administrative rules more easily if they were not constantly changing.

Response #8: In conducting examinations of mortgage brokers and loan originators, it has become clear that brokers and loan originators do not understand the Montana statutes and rules that govern them. Of particular concern to the department is that mortgage brokers and loan originators are not properly disclosing closing costs, fees, and yield spread premiums to borrowers as Montana law requires. The acceptance of fees that have not been properly disclosed frequently results in an order from the department to refund the undisclosed amounts to the borrowers. The department has proposed amendments to the rules in this rulemaking to try to address this situation. The department has proposed that it approve all continuing education providers and courses. The department has proposed these changes in an attempt to ensure that Montana mortgage brokers and loan originators know and understand Montana and federal law and comply with the laws.

Comment #9: Brian Gorman commented that ARM 2.59.1710, Records to be Maintained, is another example of creating law by rule and an example of something that they were assured would not be coming when they supported the passage of the mortgage broker licensing law, namely additional documents for the state. A grander example of administrative rule growth that micromanages the brokers' businesses and has nothing to do with helping consumers could not be thought of by

anybody other than a bureaucrat who has time to waste and does not understand that business people put their time to good use, not shuffling unnecessary paperwork. Mr. Gorman opposes the requirement for a spreadsheet but not the request for the spreadsheet because he currently keeps the spreadsheet. Steve Stiles commented that the spreadsheet is unnecessary because it contains the same information that the examiners physically look at when reviewing files. He commented that the spreadsheet is meaningless because the same information is in the files.

Response #9: The department has stated that it believes that most mortgage brokers presently maintain the information required to be on the spreadsheet in some form or other. The department does not require the information to be in any particular format and has stated that as long as the information can be generated by computer in any format, the licensee would be in compliance with the rule. The spreadsheet, or the availability of this information during an examination, will reduce examination time since the examiners use the information in the spreadsheet to identify which loan files to review. Not only do examiners use the information in the spreadsheet to determine which loan files to review, but also, and more importantly, which loan files not to review. The end result is a shorter examination time at less cost to the mortgage broker. Since this information is readily available to mortgage brokers, it is not unduly burdensome to require the mortgage broker to keep the information in some format. However, the department will remove the requirement for the following items in the spreadsheet: the age of the borrower(s), the loan number, the settlement date, the date the initial good faith estimate was mailed or hand delivered, the date the initial Truth in Lending disclosure was mailed or hand-delivered, and the loan-to-value ratio.

Comment #10: Brian Gorman commented on ARM 2.59.1710, stating that some borrowers simply will not sign, date, and return forms. Maybe the state should adopt a rule to fine the borrowers or force them to sign and date forms, but how much force is acceptable? Doug Lovely commented that it should not be a violation if the borrower refuses to sign and date a document.

Response #10: The existing rule requires that the borrower sign all disclosures required by state and federal law. The proposed amendment adds "and dated" and "and where applicable, signed and dated by the individual mortgage broker or loan originator." Mr. Gorman's comment addresses the existing rule rather than the proposed amendment to the rule, but if the forms are not signed by the borrower, the mortgage origination process should not progress until the forms are signed and returned.

Comment #11: Brian Gorman commented that on the statement of reasonable necessity for New Rule II he opposes the use of political rhetoric citing one-half of a proposed law as a rational reason to support changes and additions to the current administrative rules of the state of Montana.

Response #11: The department thanks Mr. Gorman for his comment. President Bush signed into law on July 30, 2008, the Housing and Economic Recovery Act, which includes the S.A.F.E. Mortgage Licensing Act (Act). The Act supports the changes and additions made within New Rule II, but the department is not adopting New Rule II since it has decided not to assume the role of being the sole preclicensing test administrator. The decision has been made in part because of the passage of the Act, which provides for a preclicensing test approved by the Nationwide Mortgage Licensing System and Registry. The department does not think it would be a good use of its time to develop its own test if in the future it may participate in the Nationwide Mortgage Licensing System and Registry.

Comment #12: Brian Gorman commented on New Rule VIII that brokers don't determine the borrower's equity in the dwelling and it is the lenders' job to determine if there is equity they want to lend against.

Response #12: The department concurs with both those statements, but they are not relevant to the proposed new rule. New Rule VIII states, "For purposes of 32-9-124, MCA, a scheme to defraud or mislead a borrower, lender, or any other person shall include but is not limited to: (a) misstating a borrower's income, assets, obligations, employment status, credit history, and financial resources, or the borrower's equity in the dwelling which secures repayment of the loan to the lender." The proposed new rule prohibits brokers from misstating the borrower's equity in the dwelling that secures repayment of the loan to the lender. But in reviewing this rule, it is clear that the "and" between credit history and financial resources should be an "or."

Comment #13: Doug Lovely commented that in ARM 2.59.1701(9) the definition of "restitution" is too broad and should not include fees paid to others.

Response #13: The definition was drafted as broadly as it was in order to include situations where a mortgage broker charges a fee that should be paid to a third party but increases the fee and pockets the difference. The department has encountered this practice during examinations.

Comment #14: Doug Lovely commented that New Rule VIII has some interesting definitions. He commented that as long as the broker or originator is not held liable for borrower misstatements, fine.

Response #14: The department thanks Mr. Lovely for his comments.

Comment #15: Jim Smith commented on ARM 2.59.1705, stating that eliminating courses that deal with programs, product requirements, appraisal issues, underwriting, fraudulent practices, and due diligence in meeting the needs to the housing industry is a mistake.

Response #15: The department has no jurisdiction over the appraisal process and will not accept continuing education courses that have to do with appraisal process.

Since mortgage broker and loan originators are not underwriters, underwriting courses are not relevant continuing education courses. The existing rule currently states that courses are acceptable if they discuss features of various loan products. That section of the existing rule is not being amended in this rulemaking.

Comment #16: Jim Smith commented that if the department is going to require a test with a 75% pass rate, then the department must specify what right the attendee has to retake the test if they fail and what the rights of the educators are if they continue to fail the tests. He commented that some states allow the attendee to retake the test once within two to three weeks of attending the course. If the attendee fails the test a second time or fails to retake the test within the time period, then the attendee has to retake the course in order to get credit.

Response #16: The department agrees with Mr. Smith and will remove the testing requirement after continuing education courses.

Comment #17: Primerica commented on ARM 2.59.1701(11), arguing that striking the phrase, "other work or education experience as approved by the department" from the "definition of work in a related field" is inappropriate for three reasons. First, the change is not legally required. Striking the language is in derogation of the broad statutory authority held by the department and contrary to the intent of the legislature. Second, the revisions contradict the stated purpose of the revisions. The general statement of intent is to broaden acceptable areas of experience for applicants but this revision removes the only exception that allows training opportunities. Third, the practical impact of the proposed amendment is to foreclose work opportunities for Montanans in favor of out-of-state people. Primerica suggests that the rule be redrafted as follows (with new matter underlined):

"Work in a related field" means:

(a) through (b)(v) remain the same.

(vi) as a residential real estate loan closing agent; or

(vii) for employees or exclusive agents of a mortgage broker that offers fully amortizing loan products and accepts no upfront fees, other work or education experience as approved by the department, on a case by case basis; or

(viii) as a state or federal regulator that examines compliance of residential mortgages of state or federally chartered financial institutions.

Response #17: The department deleted "other educational experience" from the definition of other "work in a related field" because allowing educational experience is outside of the authority granted to the department in 32-9-109, MCA. That section states, in relevant part, "[a]n individual applying for a license as a loan originator must have a minimum of 6 months of experience working in a related field. The department shall by rule establish what constitutes work in a related field." The statute contains mandatory language "must have a minimum of 6 months experience." A rule that allows "other educational experience as approved by the department" is clearly inconsistent with the statute. A rule is not valid or effective unless it is consistent and not in conflict with the statute pursuant to 2-4-305(6), MCA. The existing rule is invalid and the proposed amendment to the rule proposed

by Primerica would also be invalid. Therefore, the department is deleting the invalid section of the rule.

Comment #18: Primerica commented that requiring the age of the borrower on the spreadsheet could lead a disgruntled borrower to perceive discriminatory behavior and so the age requirement should be eliminated.

Response #18: The spreadsheet is not seen by borrowers so it is not clear to the department the manner in which a borrower could use that information to perceive discriminatory behavior. The federal Equal Credit Opportunity Act and federal Home Mortgage Disclosure Act both require that a creditor ask an applicant who is applying for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence, where the extension of credit will be secured by the dwelling, ethnicity, sex, marital status, and age for purposes of monitoring compliance with federal statutes that prohibit creditors from discriminating against applicants on those bases. So the information should already be in the possession of the mortgage broker who takes an application. Nevertheless, the department has agreed to remove the age requirement from the spreadsheet.

Comment #19: Primerica commented on ARM 2.59.1710(3), stating that it is structured in a manner that the loan originator takes the application from the applicant, then Primerica's affiliated federal lender generates all other documents and obtains additional information. Therefore, Primerica requests that the rule be redrafted to state: "To the extent such information is unavailable, the mortgage broker shall write 'not applicable'."

Response #19: The department does not believe such an amendment is necessary and fears it would lead to all mortgage brokers filling out the spreadsheet with N/A even if the information is available or known to the mortgage broker or loan originator.

4. The department has amended ARM 2.59.1701, 2.59.1702, 2.59.1703, and 2.59.1704 exactly as proposed and adopted New Rule I (2.59.1711), New Rule III (2.59.1712), New Rule IV (2.59.1713), New Rule V (2.59.1714), New Rule VI (2.59.1715), and New Rule VII (2.59.1716) exactly as proposed.

5. The department is not adopting New Rule II.

6. The department has amended ARM 2.59.1705, 2.59.1710, and adopted New Rule VIII (2.59.1717) with the following changes, stricken matter interlined, new matter underlined:

2.59.1705 LICENSING EXAMINATION AND CONTINUING EDUCATION PROVIDER REQUIREMENTS (1) remains as proposed.

(2) To receive approval of a licensing examination or continuing education course, the examination or course provider must file an application with the department, which includes, but is not limited to the following items:

(a) and (b) remain as proposed.

(c) a complete set of the examination or curriculum materials. Materials will be retained by the department. Electronic format is acceptable;

(d) and (e) remain as proposed.

(f) list of other states in which approval to provide similar education is held;

and

(g) a satisfactory timing method to properly monitor licensee's attendance and attention for the approved hours of the course; and.

~~(h) a comprehensive test approved by the department, to be taken at the end of the course. The licensee must pass the test with a minimum 75%.~~

(3) and (4) remain as proposed.

(5) Courses and licensing examinations must reflect the activities performed by applicants or licensees and must provide applicants or licensees with a basic knowledge of and competency in any of the following:

(a) through (g) remain as proposed.

(6) Appropriate subjects for licensing examinations may include:

(a) the Montana Mortgage Broker and Loan Originator Licensing Act;

(b) state and federal consumer protection acts;

(c) the federal Real Estate Settlement Procedures Act, Truth in Lending Act, Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Housing Act, Home Mortgage Disclosure Act, Community Reinvestment Act, and the regulations promulgated pursuant to these acts;

(d) trust account and recordkeeping requirements of the Montana Mortgage Broker and Loan Originator Licensing Act;

(e) real estate and appraisal law;

(f) arithmetical computation common to mortgage lending, including but not limited to:

(i) the computation of an annual percentage rate;

(ii) finance charges;

(iii) amount financed;

(iv) payment and amortization;

(v) credit evaluation; and

(vi) calculating debt-to-income; and

(g) ethics in the mortgage industry.

(6) remains as proposed, but is renumbered (7).

~~(7)~~ (8) The provider shall file an application with the department that includes a copy of examinations to be used, if any, in determining satisfactory comprehension of the contents of the course and the grading scale to be used. Any new or revised courses, examinations, or grading scales to be used shall be submitted to the department for approval at least 60 days prior to use. Course materials may be submitted in electronic format. The department will consider examinations and continuing education disseminated by written or electronic means, including by the Internet.

(8) through (12)(a) remain as proposed, but are renumbered (9) through (13)(a).

(b) during any six-month period, fewer than 50% of the provider's program students taking the examination for the first time achieve a passing score;

(b) through (d) remain the same, but are renumbered (c) through (e).

(13) through (19) remain as proposed, but are renumbered (14) through (20).

AUTH: 32-9-130, MCA

IMP: 32-9-110, 32-9-118, 32-9-130, MCA

2.59.1710 RECORDS TO BE MAINTAINED (1) through (3)(a) remain as proposed.

~~(b) the age of the borrower(s);~~

~~(c) the loan number;~~

(d) through (g) remain as proposed, but are renumbered (b) through (e).

~~(h) the settlement date;~~

~~(i) the date the good faith estimate was mailed or hand delivered;~~

~~(j) the date the Truth in Lending statement was mailed or hand delivered;~~

(k) remains as proposed, but is renumbered (f).

~~(l) the loan-to-value ratio;~~

(m) through (p) remain as proposed, but are renumbered (g) through (j).

AUTH: 32-9-130, MCA

IMP: 32-9-121, 32-9-124, 32-9-125, MCA

NEW RULE VIII (2.59.1717) SCHEME TO DEFRAUD OR MISLEAD

(1) remains as proposed.

(a) misstating a borrower's income, assets, obligations, employment status, credit history, ~~and~~ or financial resources, or the borrower's equity in the dwelling which secures repayment of the loan to a lender;

(b) remains as proposed.

~~(c) acceptance of any fees, or charge in excess of the fees, that have been or will be remitted to a third party; and~~ charging or accepting any fees in excess of fees that have been or will be remitted to third parties; and

(d) remains as proposed.

AUTH: 32-9-130, MCA

IMP: 32-9-124, MCA

7. The department has amended ARM 2.59.1705 to include the original references to the prelicensing test. The department has decided that it will continue to use approved education providers to administer the test. The department is not adopting New Rule II since it has decided not to assume the role of being the sole prelicensing test administrator. The decision has been made in part because of the passage of the S.A.F.E. Mortgage Licensing Act, which provides for a prelicensing test approved by the Nationwide Mortgage Licensing System and Registry. The department does not think it would be a good use of its time to develop its own test if

in the future it may participate in the Nationwide Mortgage Licensing System and Registry.

By: /s/ Janet R. Kelly
Janet R. Kelly, Director
Department of Administration

By: /s/ Michael P. Manion
Michael P. Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State September 15, 2008.